Advertising Law

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In This Issue

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Supreme Court Says Goodbye to Class Arbitration

In a 5-4 decision that is a resounding victory for businesses, the Supreme Court held that a state rule barring waivers of classwide proceedings in consumer contract arbitration clauses is preempted by the Federal Arbitration Act (FAA).

"Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration," Justice Antonin Scalia wrote for the majority.

The Concepcions sued AT&T when they were charged $30.22 sales tax for cell phones that were advertised as free. AT&T moved to compel arbitration pursuant to its sales contract that prohibited class action arbitration proceedings. But a California federal court and the 9th Circuit agreed that the class action prohibition agreement was unconscionable and therefore invalid under California law.

Looking to the FAA, a law enacted to encourage the enforcement of arbitration agreements, the Supreme Court reversed.

In writing for the majority, Justice Scalia concluded that the lower courts' rulings interfered with arbitration's "efficient, streamlined procedures."

"Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*," he wrote. "Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by [the California rule] rather than consensual, is inconsistent with the FAA."

In addition to sacrificing the informality of arbitration and increasing procedural requirements, class arbitration "greatly increases risks to defendants," Justice Scalia noted. "We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision."
Justice Scalia was joined in the majority by Chief Justice John Roberts and Justices Anthony Kennedy, Samuel Alito, and Clarence Thomas, who also authored a separate concurrence. Writing for the minority of Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan was Justice Stephen G. Breyer.

The dissenting opinion argued that the California rule did not violate the FAA because it applied "the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision," and that the merits of class proceedings should not be a factor in the decision.

The dissent also warned that potential plaintiffs may lose any chance to litigate their problems.

"In general, agreements that forbid the consolidation of claims can lead small dollar claimants to abandon their claims rather than to litigate," Justice Breyer wrote. "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"

To read the Court's opinion in *AT&T Mobility v. Concepcion*, click here.

Why it matters: The decision is a boon for companies looking to ban class action arbitration in their contracts, and some commentators have opined that the decision will result in a decrease of class action litigation as well. When consumers and businesses enter into contracts, the agreement can specify that disputes be decided through arbitration and on an individual basis.

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Judge: Data Breach = Actual Harm for Suit

Denying a motion to dismiss a class action lawsuit, a federal judge has ruled that a data security breach exposing millions of users' personal information constitutes actual harm for purposes of the suit.

Alan Claridge filed suit against RockYou, a publisher and developer of online services and applications that work with social networking sites. In December 2009 the company acknowledged that its database had been hacked and that one or more individuals had accessed the e-mail and social networking login credentials of roughly 32 million consumers.

Claridge alleged that through a written policy on its Web site, RockYou promised that it would safeguard users' personally identifiable information ("PII") by using "commercially reasonable physical, managerial, and technical safeguards to preserve the integrity and security of your personal information." The company failed, according to the suit, by failing to use any form of encryption of its data.

RockYou sought to dismiss the suit, arguing that the plaintiffs had not suffered any concrete, tangible, nonspeculative loss or harm from the breach.

But Claridge countered that personally identifiable information "constitutes valuable property that is exchanged not only for [the defendant's] products and services, but also in exchange for defendant's promise to employ commercially reasonable methods to safeguard the [information] that is exchanged. As a result, [the defendant's] role in

allegedly contributing to the breach of plaintiff's [information] caused plaintiff to lose the 'value' of their [information], in the form of their breached personal data."
U.S. District Court Judge Phyllis J. Hamilton agreed, allowing some claims in the suit to continue.

"[A]lthough the court has doubts about plaintiff's ultimate ability to prove his damages theory in this case, the court finds plaintiff's allegations of harm sufficient at this stage to allege a generalized injury in fact," she wrote.

Judge Hamilton also allowed the plaintiff's contract claims to go forward, concluding that "at the present pleading stage, plaintiff has sufficiently alleged a general basis for harm by alleging that the breach of his PII has caused him to lose some ascertainable but unidentified 'value' and/or property right inherent in the PII."

However, the court granted a motion to dismiss claims based on California's unfair competition law, finding the assertion that lost information constitutes lost money "strains the acceptable boundaries of 'injury' under the statute."

To read the complaint in *Claridge v. RockYou,* click here.

Why it matters: The court's ruling opens a potentially wide door for plaintiffs to bring suit and survive early dismissal motions, if they need only prove that a breach occurred. Judge Hamilton acknowledged that "[n]ot only is there a paucity of controlling authority regarding the legal sufficiency of plaintiff's damages theory, but the court also takes note that the context in which plaintiff's theory arises – i.e., the unauthorized disclosure of personal information via the Internet – is itself relatively new, and therefore more likely to raise issues of law not yet settled in the courts." Given that uncertainty, Judge Hamilton added that "[i]f it becomes apparent, through discovery, that no basis exists upon which plaintiff could legally demonstrate tangible harm via the unauthorized disclosure of personal information, the court will dismiss plaintiff's claims."

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Illinois Enacts Online Tax Law

Illinois Governor Pat Quinn signed the Main Street Fairness Act into law, requiring all online retailers with a business presence in Illinois to collect and remit state sales tax for every online purchase made in the state.

The law, which took effect immediately upon the governor's signature on March 10, has already had an impact in the state.

Several major retailers, including Amazon.com, have dropped their Illinois affiliates since the law was signed.

Prior to enactment of the law, Illinois consumers who did not pay sales tax were required to report and pay sales tax on out-of-state purchases made online. In a statement released by Governor Quinn, he said the state's Department of Revenue estimated that between $153 million and $170 million in sales tax revenue is uncollected each year.

"Illinois' main street businesses are critical to ensuring our long-term economic stability, which is why they must be able to compete with every company doing business online in Illinois," said Governor Quinn in the statement. "This law will put Illinois-based businesses on a level playing field, protect and create jobs and help us continue to grow in the global marketplace."

Under the law, any company with an affiliate presence in the state of Illinois – defined as "a contract with a person located in this state under which the person, for a commission or other consideration based on the sale of service by the serviceman, directly or indirectly refers potential customers to the serviceman by a link on the person's Internet website" – must collect and remit sales tax on a purchase.

An exception exists if the cumulative gross receipts are less than $10,000 over the prior year.

To read the Main Street Fairness Act, click here**.**

Why it matters: States seeking to increase tax revenue have passed similar legislation, but retailers have fought back and the constitutionality of such laws is still being questioned. Amazon has challenged laws in New York and North Carolina, and the

Digital Marketing Association recently scored a victory when a federal judge granted an injunction against the enforcement of analogous legislation in Colorado, finding that a law requiring e-commerce sites to disclose information about state residents' purchases interfered with interstate commerce.

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FDA: Hand Sanitizer, Antiseptic Claims False

The Food and Drug Administration sent letters to four companies warning them that they were violating the Food, Drug, and Cosmetic Act by claiming their hand sanitizers and antiseptic products are effective in preventing infections.

According to the FDA, Tec Laboratories Inc., JD Nelson and Associates, Dr. G.H. Tichenor Antiseptic Co., and Oh So Clean, Inc. have no evidence to back up claims that their products prevent infections from MRSA, E. coli, and the N1N1 flu virus.

In its letter to Oh So Clean, Inc., the FDA said the company had insufficient substantiation that its All-Natural CleanWell Foaming Hand Sanitizer "is a patented formulation of essential plant oils proven to kill 99.99% of germs including MRSA, Salmonella, Staph and E. coli" and "Kills 99.99% of germs naturally." Nor were other Web site claims substantiated, including such statements that the sanitizer had "Germ-Killing Technology."

"However, we are not aware of sufficient evidence that shows CleanWell All-Natural Foaming Hand Sanitizer is generally recognized as safe and effective for the uses noted above. In particular, we are not aware of evidence that this product is safe and effective in preventing individuals from becoming infected by *E. coli, Klebsiella pneumoniae, MRSA, Pseudomonas aeruginosa, Salmonella,* and *Staphylococcus aureus*," according to the letter.

Because the claims of the product show that it is "intended for use in the cure, treatment, mitigation, or prevention of disease, or is intended to affect the structure or any function of the body of man," according to the letter, the products are new drugs under the FDCA, requiring the FDA's approval.

The company made similar claims about its hand-sanitizing wipes and nonfoaming hand sanitizer as well, the FDA said.

To read the warning letter to Oh So Clean, click here.

Why it matters: “MRSA is a serious public health threat,” Deborah Autor, director of the Office of Compliance in the FDA’s Center for Drug Evaluation and Research, said in a statement about the warning letters. “The FDA cannot allow companies to mislead consumers by making unproven prevention claims.” The agency issued a contemporaneous consumer update, advising the public not to believe claims that hand sanitizers and antiseptic products can prevent infections.

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